Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1977

No. 77-1150

CONCERNED CITIZENS OF SOUTHERN OHIO, INC., et al.
Appellants,

vs.

THE PINE CREEK CONSERVANCY DISTRICT, et al.
Appellees.

On Direct Appeal From The United States District Court For The Southern District of Ohio Western Division

MOTION TO AFFIRM

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The appellees in the above captioned case move the Court to affirm the judgment of the three-judge court on the ground that it is manifest that the decision of the three-judge court is correct and the arguments of appellants are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

Appellees agree to the Statement of the Case as set forth in appellant's Jurisdictional Statement.

ARGUMENT

I. Chapter 6101 Of The Ohio Revised Code Complies With All Applicable Due Process Requirements Of The Fourteenth Amendment To The Constitution Of The United States

Section 6101.36 of the Ohio Revised Code allows all persons a jury trial before any property may be taken. The fact that such a trial would be held before a judge who is a member of the same Court of Common Pleas as the Conservancy Court Judge does not create a constitutional infirmity. (Appeals are taken to this Court under Sections 163.01 to 163.32, Ohio Revised Code, Appellants' Jurisdictional Statement, p. 4.) Appellants have made no showing that a judge would be biased because he must review the action of a fellow member of the bench.

Appellants have attempted to merge the Board of Directors and the Board of Appraisers into the Conservancy Court. They claim that since the Conservancy Court appoints the Board of Directors and the Board of Appraisers, the Conservancy Court cannot act fairly in reviewing actions of these boards. No specific illustration is set forth by appellants for this abstract argument nor is any authority cited to support this position.

Appellees submit that courts have historically appointed masters, hearing officers and referees to make findings and recommendations. Appellees have found no case holding that a court cannot constitutionally review the findings or recommendations of the persons appointed. This is especially true where, as in this case, the right of appeal is preserved for any proper party.

In examining the merits of this constitutional attack of appellants upon the impartiality of the Conservancy

Court, the District Court correctly rejected appellants' position. Under *Hauck vs. Little River District*, 239 U.S. 254 (1915), there was no constitutional right to an adjudicative hearing on the formation of the conservancy district. Thus, a hearing was merely an additional check on a legislative process. Additionally, the District Court found that there was no "substantial" pecuniary interest of the judges of the Conservancy Court in the outcome of a given determination. Judges are paid whether or not the district is formed. The possibility of future compensaton is neither conflicting nor substantial. Judges of the Conservancy Court will be paid from a general fund. This case is similar to *Dugan vs. Ohio*, 277 U.S. 61 (1928), which clearly distinguished *Tumey vs. Ohio*, 273 U.S. 510 (1927).

The reasoning of the District Court is clear, concise and correct. No substantial constitutional question is raised by appellants.

II. Section 6101.07, Ohio Revised Code, Does Not Deprive Either Landowners Or Voters Within A Conservancy District Of Equal Protection Of Of The Laws

The reasoning of the District Court in denying the "one-man one-vote" arguments of appellants is set forth at pages 41, 42 and 43 of the Jurisdictional Statement. Appellees will not burden the Court by restating the District Court reasoning in its entirety, but will simply try to summarize the reasoning.

In summary, the constitutional arguments of appellants were rejected for three reasons. First, the Conservancy Court functions are primarily judicial and "one-man one-vote" does not apply under *Wells vs. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), aff'd,

409 U.S. 1095 (1973). Second, an Ohio conservancy district exists for a limited purpose and "one-man one-vote" does not apply under *Salyer Land Co. vs. Tulare Water District*, 410 U.S. 719 (1973). Third, the members of a Conservancy Court are not elected, are essentially appointed by the legislature, and "one-man one-vote" does not apply under *Sailors vs. Board*, 387 U.S. 105 (1967).

Section 6101.07, Ohio Revised Code, does not deprive the appellants of any constitutional right and was correctly held to be constitutional by the District Court.

III. Section 6101.05, Ohio Revised Code, Does Not Deprive A Freeholder Of A Constitutional Right And Appellants' Claims Relating To This Section Are Barred By Laches

Appellants erroneously claim that under Section 6101.05, Ohio Revised Code, a freeholder residing in a public corporation is conclusively presumed to favor creation of the conservancy district if the public corporation supports the district. This completely ignores the provisions of Section 6101.08, Ohio Revised Code, which allow any freeholder to object to the formation of the district unless the freeholder has personally signed the petition for formation of the district.

As pointed out by the dissenting opinion in the previous appeal of this case, the claims of these appellants relating to formation of the Conservancy District should be barred by laches. *Concerned Citizens vs. Pine Creek Conservancy District*, 429 U.S. 651, (1977). Appellants have presented no excuse for the delay from 1966, when the district was formed, to 1975, when this suit was filed.

The District Court properly overruled appellants' constitutional argument involving Section 6101.05, Ohio Revised Code.

CONCLUSION

Appellants have raised no substantial questions or arguments necessitating further argument before this Court. Appellees, therefore, respectfully request this Court to grant their Motion to Affirm the decision of the three-judge court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Affirm has been sent to Michael N. Tousey, 169 East Livingston Avenue, Columbus, Ohio, 43215, attorney for appellants, this 4th day of May, 1978.

DUKE W. THOMAS

§6101.36. *Possession after verdict and deposit of award.* (GC §6828-35)

No property shall be taken under sections 6101.04 to 6101.84, inclusive, of the Revised Code, until compensation has been paid according to law. But where a trial is had by jury, and a verdict has been rendered which has been confirmed by the trial court, the board of directors of the conservancy district may pay the amount allowed into court in money with the costs, and thereupon such court shall make an order admitting the district into possession of the property and confirming its title thereto, although the owner may take steps to take the case to a higher court. Thereupon the board may enter into undisturbed possession of the property and rights involved.